

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 20 November 2003

CASE No.: 2002-BLA-5267

In the Matter of:

RALPH O. BANKS,
Claimant

v.

DRUMMOND COAL COMPANY,
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:

Patrick Nakamura, Esquire,
For the Claimant

Laura A. Woodruff, Esquire,
For the Employer

Before: ROBERT J. LESNICK
Administrative Law Judge

DECISION AND ORDER- DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* ("the Act"). Regulations implementing the Act have been published by the Secretary of Labor in Title 20 of the Code of Regulations.

The Act provides benefits to persons totally disabled due to pneumoconiosis and to certain survivors of persons who had pneumoconiosis and were totally disabled at the time of their death or whose death was caused by pneumoconiosis. Pneumoconiosis is a chronic dust disease of the lungs, including respiratory and pulmonary impairments arising out of coal mine employment, and is commonly referred to as black lung.

On June 28, 2002, the Director, Office of Workers' Compensation Programs, referred this case to the Office of Administrative Law Judges for a formal hearing.¹ (DX 26). A hearing was held before the undersigned on March 27, 2003, in Birmingham, Alabama. At the hearing, Director's Exhibits 1 through 29 were admitted into evidence. (TR 5). In addition, Claimant's pre-hearing report was marked ALJ-1, Employer's pre-hearing report was marked ALJ-2, and the Director's pre-hearing report was marked ALJ-3. Employer filed a closing brief on June 9, 2003. Claimant filed his closing brief on June 11, 2003.

The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, including all documentary evidence admitted, arguments made, and the testimony presented. Where pertinent, I have made credibility determinations concerning the evidence.

ISSUES

In a letter dated June 5, 2002 (DX 27), Employer contested the issue of responsible operator. However, by letter dated October 8, 2002, counsel advised that Employer did not anticipate contesting its designation as responsible operator because Claimant's last qualifying coal mine employment was in 1985 for Drummond Coal. On the Form CM-1025 transmittal sheet, Employer contested the following issues:

- (1) The length of Claimant's coal mine employment?
- (2) Whether Claimant has pneumoconiosis as defined by the Act and Regulations?
- (3) Whether his pneumoconiosis arose out of coal mine employment?
- (4) Whether Claimant is totally disabled?
- (5) Whether his total disability is due to pneumoconiosis?

(DX 27).

FINDINGS OF FACT

I. Background and Procedural History²

The Claimant filed his claim for benefits on March 5, 2001. (DX 2). On November 28, 2001, the district director issued a Proposed Decision and Order Awarding Benefits. (DX 17). The district director credited Claimant with 13 years of coal mine employment from June 1947 to September 30, 1985. (DX 17). By Order of December 4, 2001, the district director rescinded

¹ The following references will be used herein: TR for transcript, CX for Claimant's exhibit, DX for Director's exhibit, and EX for Employer's exhibit.

² Given the filing date of this claim, subsequent to the effective date of the permanent criteria of Part 718, (*i.e.* March 31, 1980), the Regulations set forth at 20 C.F.R. Part 718 will govern its adjudication. Because Claimant's last exposure to coal mine dust occurred in Alabama this claim arises within the territorial jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Broyles v. Director, OWCP*, 143 F.3d 1348, 21 BLR 2-369 (10th Cir. 1998).

its Proposed Decision and Order Awarding Benefits because it was issued prematurely. (DX 18). On March 21, 2002, the district director issued a Proposed Decision and Order Denying Benefits because Claimant failed to establish any/all elements of entitlement. (DX 23). Claimant appealed the denial on April 16, 2002. (DX 24). A hearing was initially scheduled for November 20, 2002, before Judge Gerald M. Tierney, but was continued at Claimant's request.

A hearing took place before the undersigned on March 27, 2003. Claimant testified that his first coal mining job was in 1947 for H.E. Drummond Coal Company. (TR 8). He worked there for one year and five months loading coal in an underground coal mine. (TR 9). He then worked in an underground coal mine for Donald Goldsmith for one year, loading coal. (TR 10-11). Claimant stated that he next worked for Johnny Nichols and John Drummond as a coal scrapper. (TR 11-12). He then hauled coal for a year for McNally Construction and Coal. (TR 12). He worked for Republic Steel from April 1, 1952, until September 1953. He noted this was a construction/repair job but was very dusty. (TR 13). He then worked for Pullman Standard making box cars for the railroad. (TR 13). Claimant was laid off from Pullman in 1968. (TR 15). Claimant then went to work at Drummond at the Kellerman Mine for 6 months. (TR 16). Thereafter, Claimant went back to Pullman Standard until September 1969. (TR 16). He worked at the Flat Top Mine, which was a strip mine, for about six years, until 1975. (TR 17). He then worked at the Sunlight Mines which was also a Drummond Mine. (TR 18). Claimant worked as a foreman until 1976. Claimant stated that he then went to the Jasper Maintenance which was a shop in Jasper. (TR 18).

From 1969 until 1985 Claimant primarily did maintenance and welding work. (TR 19). He conducted his work in the coal pit. (TR 19). He noted that the conditions were very dusty around the strip mine. (TR 20). For his last ten years in the coal mine, he was a supervisor. (TR 20). He would have to go into the pit to check on loaders having mechanical problems. (TR 20). Claimant testified that he left the mines in 1985, primarily because he was having problems doing the job. He could not climb the boons, he could not walk in the mud, and he could not get under the loaders and the dozers because of his breathing. (TR 21). After leaving the mines, Claimant was self-employed and had a radiator shop. He did this work for four years until he had a heart attack in 1988. (TR 21).

On cross-examination, Claimant stated he worked for Pullman Standard for 16 years as a welder. (TR 23). Claimant stated that in 1975, he supervised welders at the Jasper site. Their job was to rebuild all of the bins. Claimant stated that coal was not being mined there, but coal was being processed at the plant while he worked. (TR 24). In 1976, he moved to the maintenance shop. Claimant admitted that he spent most of his time in the shop supervising 14 welders. (TR 25). It was an enclosed shop with a few ceiling fans and heat. (TR 25). He added that the shop was not close to any mine. (TR 26). He worked in various shops for Drummond over a ten year period. (TR 26).

Claimant testified that he sees Dr. Westerman for his breathing and is on four inhalers. (TR 22). He is also on oxygen at night. (TR 22). Claimant testified he saw a cardiologist, Dr. Martin, twice per year. (TR 27). He was on several medications: Coumadin, Lanoxin and Lipitor. (TR 27). Claimant had bypass surgery in 1988, and prostate cancer surgery in 1992. (TR 28). In March 2001, Claimant was hospitalized because he could not breathe. (TR 28).

Claimant had filed a claim in 1992 for asbestos exposure and occasionally received a check. (TR 30). Claimant noted he smoked as a teenager until the mid-1970s. (TR 31).

II. Medical Evidence

A. Chest X-rays

Exhibit No.	Date X-ray	Physician/Qualifications	Diagnosis
DX 8	5-22-01	Loveless/ B	Negative for CWP
DX 8	5-22-01	Sargent/ BCR,B	Film quality 2
DX 9	10-17-01	Hasson/ B	Negative

B. Pulmonary Function Studies

Ex No.	Date	Age	Height	FEV1	MVV	FVC	Qualifying
DX 8	5-22-01	72	67"	1.60	62	2.52	Yes
DX 9	10-17-01	72	66"	1.77	54	2.37	No

C. Arterial Blood Gas Studies

Exhibit No.	Date	pO₂	pCO₂	Qualify
DX 8	5-22-01	77	42	No
		74*	40*	No
DX 9	10-17-01	78.8	40	No

*Post-exercise

D. Medical Reports

Dr. Jeffrey Hawkins

Dr. Hawkins, who is Board-Certified in Internal Medicine and Pulmonary Disease (DX 23), issued a medical report dated June 18, 2001. (DX 8). Dr. Hawkins examined Claimant at the request of the Department of Labor on May 22, 2001. Dr. Hawkins reviewed Claimant's

occupational history and noted a family history positive for high blood pressure, heart disease, diabetes, cancer, allergies, and stroke. He noted a positive medical history of frequent colds, attacks of wheezing, chronic bronchitis, bronchial asthma, arthritis, heart disease, and cancer of the prostate. Claimant reported a smoking history of one pack of cigarettes per day from the age of 10 until 1976.

Claimant's chief complaints were dyspnea, cough, chest pain, orthopnea, ankle edema, and paroxysmal nocturnal dyspnea. Physical examination revealed ankle edema and decreased breath sounds on auscultation but clear. The chest x-ray showed no evidence of pneumoconiosis, the vent study showed a mild to moderate airflow obstruction, and the arterial blood gases showed adequate resting and exertional gas exchange. The EKG demonstrated atrial fibrillation and incomplete RBBB. Dr. Hawkins diagnosed Claimant as having: (1) chronic obstructive lung disease ("COPD"), based on a history of cigarette smoking and spirometry showing an airflow obstruction; (2) coal workers' lung disease, based on coal dust exposure and abnormal spirometry; and (3) cardiomyopathy, coronary artery disease/CABG/exertional chest pain. He concluded that Claimant's COPD was due to cigarette and cigar smoking, that Claimant's coal workers' lung disease was due to coal mine dust exposure, and that Claimant's cardiomyopathy was due to atherosclerotic coronary artery disease. Dr. Hawkins noted that Claimant had a moderate impairment and that the coal workers' lung disease made up 40% of said impairment.

Dr. Jack H. Hasson

The medical report of Dr. Hasson is dated October 17, 2001. (DX 9). Dr. Hasson is Board-Certified in Internal Medicine, Critical Care Medicine and Pulmonary Disease. He examined Claimant on October 17, 2001. Dr. Hasson noted Claimant complained of shortness of breath on exertion, sputum production, and chronic sinus problems. He reviewed Claimant's occupational history and noted Claimant worked underground from 1947 to 1952, then worked in strip mines as a welder for 17 years. He also noted Claimant worked 16 years for Pullman Standard where he was exposed to asbestos. He noted a smoking history of one pack per day from the 1940s to 1974. Dr. Hasson noted a positive family history of hypertension, stroke, heart attack, and diabetes. Physical examination revealed some ankle edema. The vent study showed some small airways obstructive changes with a severely reduced MVV. He reviewed the arterial blood gases and noted an x-ray that was negative for coal worker's pneumoconiosis. Dr. Hasson diagnosed Claimant as having no evidence of coal workers' pneumoconiosis ("CWP"), mild COPD, coronary artery disease, cancer of the prostate, and kidney stones. He concluded that Claimant had no evidence of CWP and that there was only a mild obstructive impairment.

In a follow-up letter dated December 17, 2001, Dr. Hasson stated that Claimant had a mild impairment related to COPD and this was not related to coal dust inhalation. (DX 10).

Dr. Allan R. Goldstein

The medical report of Dr. Goldstein is dated December 21, 2001. (DX 11). Dr. Goldstein is Board-Certified in Internal Medicine and Pulmonary Disease. He conducted a medical record review at the request of Employer. He opined that Claimant did not have coal workers' pneumoconiosis. He stated Claimant did not have a significant impairment and that

Claimant was not totally disabled from a pulmonary standpoint. He opined Claimant did not have any lung condition caused by the inhalation of coal dust or his coal mine employment. He added, "I think his pulmonary abnormality is related to his history of smoking. His impairment is also related to that." Dr. Goldstein disagreed with Dr. Hawkins and stated, "The medical data in this chart, including the history, physical examination and laboratory evaluation do not support a diagnosis of coal workers' pneumoconiosis; rather, they support a diagnosis of chronic obstructive lung disease."

CONCLUSIONS OF LAW

Length of Coal Mine Employment

In his application for benefits, Claimant alleged 22 years of coal mine employment. (DX 2; DX 3). In a Proposed Decision and Order, dated March 21, 2002, the district director found that Claimant had been employed in the coal mines for 13 years and 9 months. (DX 23; DX 15). At the hearing, counsel for Claimant claimed 18 years of coal mine employment. (TR 33). Employer agreed to approximately 14 years of coal mine employment in its brief. (see Employer closing brief, page 1).

At the hearing, Claimant testified regarding his coal mine employment. Unfortunately, Claimant's testimony did little to clarify the situation. The Social Security records (DX 5) showed some gaps, but I find that these records support the district director's finding of 13 years and 9 months of coal mine employment. Because there is no credible evidence to the contrary, I find that Claimant was a coal miner within the meaning of the Act for at least 13 years and 9 months.

Date of Filing

I find that Claimant filed his claim for benefits under the Act on March 5, 2001. (DX-2).

Responsible Operator

In the CM-1025 transmittal sheet, Employer contested the issue of responsible operator. (DX-26). However, Employer, by letter of October 8, 2002, advised it was no longer contesting this issue. The evidence of record is supportive of this stipulation. Therefore, I find that Drummond Coal Company is the properly designated responsible operator and will provide payment of any benefits awarded to Claimant.

Dependents

I find that Claimant has one dependent, his wife, Betty for purposes of augmentation of benefits under the Act. (DX 2).

Entitlement

I. Determination of Pneumoconiosis

Thirty U.S.C. § 902(b) and 20 C.F.R. § 718.201 define pneumoconiosis as “a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.”³ The definition is not confined to “coal workers’ pneumoconiosis,” but also includes other diseases arising out of coal mine employment, such as anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis.⁴ 20 C.F.R. § 718.201. The term “arising out of coal mine employment” is defined as including “any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.”

³ Pneumoconiosis is a progressive and irreversible disease; once present, it does not go away. *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Lisa Lee Mines v. Director*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*) at 1364; *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3d Cir. 1995) at 314-315.

⁴ Regulatory amendments, effective January 19, 2001, state:

(a) For the purpose of the Act, “pneumoconiosis” means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or “clinical”, pneumoconiosis and statutory, or “legal”, pneumoconiosis.

(1) *Clinical Pneumoconiosis*. “Clinical pneumoconiosis” consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers’ pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) *Legal Pneumoconiosis*. “Legal pneumoconiosis” includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a disease “arising out of coal mine employment” includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, “pneumoconiosis” is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. § 718.201 (Emphasis added).

Thus, asthma, asthmatic bronchitis, or emphysema may fall under the regulatory definition of pneumoconiosis if they are related to coal dust exposure. *Robinson v. Director, OWCP*, 3 B.L.R. 1-798.7 (1981); *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1983). Likewise, chronic obstructive pulmonary disease may be encompassed within the legal definition of pneumoconiosis. *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173 (4th Cir. 1995).

The claimant has the burden of proving the existence of pneumoconiosis, and may satisfy this burden by four methods. The Regulations provide the means of establishing the existence of pneumoconiosis by: (1) a chest X-ray meeting the criteria set forth in 20 C.F.R. § 718.202(a); (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. § 718.106; (3) application of the irrefutable presumption for “complicated pneumoconiosis” found in 20 C.F.R. § 718.304; or (4) a determination of the existence of pneumoconiosis made by a physician exercising sound judgment, based upon certain clinical data and medical and work histories, and supported by a reasoned medical opinion. 20 C.F.R. § 718.202(a). Pulmonary function studies are not diagnostic of the presence or absence of pneumoconiosis. *Burke v. Director, OWCP*, 3 B.L.R. 1-410 (1981).

A. Chest X-ray Evidence

A finding of the existence of pneumoconiosis may be made with positive chest x-ray evidence. 20 C.F.R. § 718.202(a)(1). The existence of pneumoconiosis may be established by chest x-rays classified as category 1, 2, 3, A, B, or C according to ILO-U/C International Classification of Radiographs. A chest x-ray classified as category 0, including subcategories 0/-, 0/0 and 0/1, does not constitute evidence of pneumoconiosis. 20 C.F.R. § 718.102(b). Where two or more x-ray reports are in conflict, the radiological qualifications of the physicians interpreting the x-rays must be considered. §718.201(a)(1).

While a judge is not required to defer to the numerical superiority of x-ray evidence, although it is within his or her discretion to do so. *Wilt v. Woverine Mining Co.*, 14 B.L.R. 1-70 (1990) citing *Edmiston v. F & R Coal*, 14 B.L.R. 1-65 (1990). The ALJ must rely on the evidence which he deems to be most probative, even where it is contrary to the numerical majority. *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1984).

In summary, there are two (2) interpretations of two (2) x-rays in the record. Both of the readings, by B-readers, were negative for pneumoconiosis. Accordingly, as all of the interpretations are negative for pneumoconiosis, I find that Claimant has not established, by the preponderance of the evidence, the existence of pneumoconiosis pursuant to §718.202(a)(1).

B. Biopsy Evidence

Pursuant to §718.202(a)(2) Claimant may establish pneumoconiosis through the use of biopsy evidence. Since no such evidence was submitted, pneumoconiosis has not been established in this manner.

C. Presumptions

Under §718.202(a)(3) it shall be presumed that a miner is suffering from pneumoconiosis if the presumptions provided in §§718.304, 718.305, or 718.306 apply.

Initially, I note that Claimant cannot qualify for the §718.305 presumption because he did not file this claim before January 1, 1982. Claimant is also ineligible for the §718.306 presumption because he is still living. Moreover Claimant is ineligible for the §718.304 presumption as there is no credible evidence that Claimant suffers from complicated pneumoconiosis.⁵

Based on the foregoing, Claimant has failed to establish the existence of pneumoconiosis pursuant to §718.202(a)(3).

D. Medical Opinions

Lastly, under §718.202(a)(4) a finding of pneumoconiosis may be based on the opinion of a physician, exercising sound medical judgment, who concludes that the miner suffers or suffered from pneumoconiosis. Such conclusion must be based on objective medical evidence and must be supported by a reasoned medical opinion.

1. Smoking History

Claimant consistently reported a smoking history of one pack of cigarettes per day from a teenager to the mid-1970s. (DX 8; DX 9; TR 31). Accordingly, I find Claimant had a smoking history of at least 34 pack years ending in or about 1975.

2. Analysis of Medical Opinions

Of record are the opinions of Dr. Hawkins, who found the existence of pneumoconiosis, and Drs. Hasson and Goldstein, who found no pneumoconiosis to be present.

I first note that Drs. Hawkins, Hasson, and Goldstein are highly qualified physicians who have excellent credentials. All three are Board-Certified in Internal Medicine and Pulmonary Disease. Dr. Hasson is additionally Board-Certified in Critical Care Medicine. Accordingly, I find Drs. Hawkins, Hasson, and Goldstein to be highly qualified to render an opinion in this matter. *Burns v. Director, OWCP*, 7 B.L.R. 1-597 (1984).

I accord greater weight to the opinion of Dr. Hawkins on this issue. He diagnosed the presence of pneumoconiosis based on Claimant's history of coal mine employment and

⁵ Complicated pneumoconiosis is established by x-rays classified as Category A, B, C, or by an autopsy or biopsy that yields evidence of massive lesions in the lung. I find that there are no x-rays in evidence that have been so classified. None of the physicians who rendered an opinion in this case diagnosed the presence of complicated pneumoconiosis. Accordingly, this presumption is not applicable.

Claimant's abnormal spirometry that showed a mild to moderate airflow obstruction. I find Dr. Hawkin's report to be better reasoned than the opinions of Drs. Hasson and Goldstein. As noted in the regulations, the definition of "legal pneumoconiosis" specifically includes any chronic restrictive or obstructive lung disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). Dr. Hasson admitted Claimant had mild COPD but stated without any explanation that the COPD was not due to coal dust inhalation. Likewise, Dr. Goldstein admitted that the medical data supported the diagnosis of chronic obstructive lung disease but related the COPD, without explanation, to Claimant's history of smoking. Dr. Goldstein provided no rationale how he was able to rule out coal mine dust exposure as a factor in the development of Claimant's COPD. For these reasons, I accord the opinion of Dr. Hawkins greater weight.

Based on all of the foregoing, I find Claimant has established the existence of pneumoconiosis pursuant to §718.202(a)(4).

II. Cause of Pneumoconiosis

Once it is determined that the miner suffers from pneumoconiosis, it must be determined whether the miner's pneumoconiosis arose, at least in part, out of coal mine employment. 20 C.F.R. §718.203(a). If a miner who is suffering from pneumoconiosis was employed for ten years or more in the coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment.

I find that Claimant, with 13 years and 9 months of qualifying coal mine employment, is entitled to the rebuttable presumption in §718.203. I further find Employer has presented no credible evidence to rebut this presumption.

III. Evidence of Total Disability

A miner shall be considered totally disabled if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner from performing his usual coal mine work or comparable employment. 20 C.F.R. §718.204(b)(1). Section 718.204 sets out the standards for determining total disability. This section provides that in the absence of contrary probative evidence, evidence that meets the quality standards of the subsection shall establish the miner's total disability.

Subsection 718.204(b)(2)(i) provides that total disability may be established by pulmonary function testing. There are two pulmonary function studies submitted as part of Claimant's claim for benefits. The earlier study from May 22, 2001, produced qualifying values, while the values from the October 17, 2001 study were not qualifying. There is one qualifying study and one non-qualifying study, and the more recent test yielded non-qualifying results. Thus, I find that Claimant has not established, by a preponderance of the evidence, total disability pursuant to §718.204(b)(2)(i).

Subsection 718.204(b)(2)(ii) provides that qualifying arterial blood gas testing may establish total disability. There are two arterial blood gas studies in the record. Neither study

produced qualifying values, thus the Claimant has not established total disability by this method. Additionally, there is no evidence that the Claimant suffers from cor pulmonale with right-sided congestive heart failure pursuant to §718.204(b)(2)(iii).

Subsection 718.204(b)(2)(iv) provides that total disability may be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concluded that a claimant's respiratory or pulmonary impairment prevents him from engaging in his usual coal mine work or in comparable and gainful employment.

There are three (3) physicians who have rendered opinions in this matter relative to this issue. Dr. Hawkins opined Claimant had a moderate pulmonary impairment but did not indicate whether Claimant maintained the pulmonary capacity to perform his last coal mine employment as a supervisor of welders at a maintenance shop. Dr. Hasson concluded Claimant had a mild pulmonary impairment and, likewise, did not indicate whether Claimant maintained the pulmonary capacity to perform his last coal mine employment. Lastly, Dr. Goldstein opined Claimant was not totally disabled from a pulmonary standpoint but also did not discuss the exertional requirements of Claimant's last coal mine employment.

It must be noted that Claimant bears the burden of establishing by the preponderance of the evidence this element of entitlement. *Mazgaj v. Valley Camp Coal Co.*, 9 B.L.R. 1-201 (1986). Claimant has not provided any reasoned medical opinion evidence that he was totally disabled from a pulmonary standpoint from his last coal mine employment as a supervisor of welders. Therefore, I find, based on the foregoing, that Claimant has not established the existence of total disability pursuant to §718.204 (b)(2)(iv).

I find, in light of the equivocal pulmonary function studies, non-qualifying arterial blood gas studies, and the opinions of the physicians who submitted medical opinions, Claimant has failed to establish, by a preponderance of the evidence, that he is totally disabled within the meaning of §718.204(b).

IV. Disability Causation

The final issue is whether Claimant has established disability causation at Section 718.204(c)(1). A miner shall be considered totally disabled due to pneumoconiosis if "pneumoconiosis...is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.204(c)(1). "Pneumoconiosis is a 'substantially contributing cause' of the miner's disability if it: (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i-ii).

In this case, the record established the existence of pneumoconiosis, but not a totally disabling respiratory impairment. Therefore, this issue is moot.

CONCLUSION

Because Claimant has failed to prove all elements of entitlement, I must conclude that he has failed to establish entitlement to benefits under the Act.

ATTORNEY FEES

The award of an attorney's fee under the Act is permitted only in cases in which Claimant is found to be entitled to benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee for services rendered to him in pursuit of this claim.

ORDER

The claim of RALPH O. BANKS for benefits under the Black Lung Benefits Act is hereby denied.

A

ROBERT J. LESNICK
Administrative Law Judge

RJL/LW/dmr

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. §725.481, any party dissatisfied with this Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing a Notice of Appeals with the Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits. His address is Room N-2117, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210.